Arizona Department of Economic Security

Appeals Board

Appeals Board No. T-1002418-001-BR

In the Matter of:

X	E S A TAX UNIT C/O ROBERT DUNN III ASSISTANT ATTORNEY GENERAL 1275 W WASHINGTON ST CFP/CLA PHOENIX, AZ 85007-2926
Employer	Department

D E C I S I O N

AFFIRMED UPON REVIEW

The **EMPLOYER,** through counsel, requests review of the Appeals Board decision issued on December 1, 2006, which affirmed the Department's Decision of June 14, 2005, and held that the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued May 27, 2004, are final and binding on the Employer

The request has been timely filed and the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-672(F).

In the request for review, the Employer, through counsel, contends that the Department failed to serve the Determinations on the last known address, or in the alternative, that the delay in submission was "...due to Department error or misinformation or other action of the post office."

Counsel contends that the dispute arose when a Notice to Employer about a worker, X, was mailed to a company in the same building as the Employer at the X address. Counsel contends that X was the Employer's address to which its mail is delivered and is the address that is registered with the Arizona Corporation Commission. The Department is not privy to the address used by other parties for mailing to the Employer, and does not rely on the address a business may have registered with the Arizona Corporation Commission. In conducting the

investigation about the correct employer for X, Department relied on information from X, and a 1099 form issued to X by the Employer and showing the PO Box (Bd. Exhs. 1A-4, 8A, 30). When an employer issues a form 1099, it is assumed that this is an address is one to which mail should be sent.

Counsel contends that the audit letter was sent on April 21, 2004 to the PO Box, but that notations on the letter indicate that the audit of May 10, 2004, would be conducted at the X address (Bd. Exh. 31). Counsel ignores the fact that an entity may have one address for mail and a different address for conducting business. It is obvious that an audit could not be conducted at a PO Box. The Department's knowledge of a physical address does not constitute notice of an entity's change of address for mailing purposes. In connection with the audit letter, the fact that the Employer received it at the PO Box, and was able to respond with a request for a new date and physical location indicates that the PO Box was still a good mailing address. Counsel contends that the Employer's receipt of other items mailed by the Department to the PO Box was fortuitous because another entity in the same building uses the PO Box. It may be that the other entity is the one that prepared the 1099 form which counsel now states was an "error". Any error in completing the form listing the Employer's address is imputed to the Employer.

Counsel also contends that the Employer responded to the Determinations within 13 days after receiving them. The 15 day time period for filing a timely response starts running when the Determinations were mailed to the last known address. They were mailed to the Employer's last known mailing address. If personal service was required by the statute, the Department would have had to secure a physical location for the Employer. Even if the Employer had not received the Determinations until after the fifteenth day, the Determinations would still have been correctly served on the Employer.

Counsel further contends that claims should be heard on their merits, and cites Cummins v. Dept of Econ Sec., 182 Ariz. 68, 70, 893 P.2d 68, 70 (App. 1995) for the proposition that "[c]laims *should* be heard on their merits if the failure to comply with a deadline or attend a hearing is of the type which can be said to be excusable." That citation is from Maldonado v. Arizona Department of Economic Security and Broadway Southwest Stores, 182 Ariz. 476, 897 P.2d 1362 (Ariz. App. 1994). It is not a holding in the case citing it. The Cummins court held that, because the appeal rights did not state that an appeal mailing date would be judged by the postmark, the document was timely filed, although postmarked one day late. Excusable neglect, from Maldonado was not part of the decision in Cummings.

Department error or postal error or delay is not present in this case. Counsel contends that there is an excusable situation. There is no "good cause" exception to the 15-day deadline for filing appeals found in A.R.S. § 23-671(D) or in Arizona Administrative Code, Section R6-3-1404. In Roman v. Arizona

Department of Economic Security, 130 Ariz. 581, 637 P.2d 1084 (App. 1981), the Arizona Court of Appeals specifically held at page 1085:

> The language of A.R.S. § 23-671(C) [now A.R.S. § 23-671(D)], unambiguously states that the Appeals Tribunal decision shall become final unless within fifteen days an appeal is filed. There is no statutory authority for a "good cause" exception to this rule. Thus, to interpret A.C.R.R. [now A.A.C.] R6-3-1404 as appellant urges would amount to an amendment of the statute contrary to the legislative intent. Ferguson v. Arizona Department of Economic Security, 122 Ariz. 290, 594 P.2d 544 (App. 1979).

We find that this is equally applicable to cases arising under Arizona Revised Statutes § 23-724(A)

A Determination of Unemployment Insurance Liability and a Determination of Liability for Employment or Wages were sent by certified mail on May 27, 2004, to the Employer's last known address of record. The Determinations advised the Employer that the Determinations would become final unless written request for reconsideration was filed within fifteen days of the date of the Determinations (Bd. Exhs. 7-10).

The envelope was addressed to the Employer at P O Box X, Phoenix, AZ 85080. The documents and the envelope were returned to sender with the notation "FORWARDING ORDER EXPIRED" (Bd. Exh. 9). The Department had only one mailing address of record for the Employer at the time it mailed the two Determinations. This was P O Box X, Phoenix, AZ 85080 (Tr. pp. 14, 15, 33, 36, 39-47, 64; Bd. Exhs. 1-3, 30, 31, 33, 36, 39).

The Employer received the two Determinations on June 11, 2006 (Tr. pp. 72, 73; Bd. Exhs. 14, 15).

On June 24, 2004, as indicated by the date of the document, the Employer filed a request for reconsideration (Tr. p. 12; Bd. Exh. 15).

Arizona Revised Statutes § 23-724(A) provides:

> A. When the department makes a determination, which determination shall be made either on the motion of the department or upon application of an employing unit, that an employing unit constitutes an employer as defined in § 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in

> § 23-615 which is not exempt under § 23-617 or that remuneration for services constitutes wages as defined in § 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration (emphasis added).

Here, there were two Determinations mailed to the address that the Employer used as a mailing address. The Employer received the determinations on June 11, 2004, and could have filed timely appeals on that date. The Employer did not file appeals until June 24, 2004.

Based upon the evidence before us, the Board concludes that the Employer failed to timely request reconsideration of the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued May 27, 2004, and the Employer is not entitled to a hearing on the merit issues in this matter.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **EMPLOYER,** through counsel, has not submitted any newly-discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;

2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;

3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;

4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Dissenting:

After reviewing the Employer's request for review of the Appeals Board's decision dated December 1, 2006, I am persuaded that the decision is incorrect. Accordingly, I respectfully dissent from the Affirmed Upon Review decision of the majority of the Board (hereafter called "the majority") wherein the majority affirms the previous Board decision dated December 1, 2006. I would reverse the Board decision dated December 1, 2006, for the reasons that follow.

This case involves whether the Employer filed a timely request for reconsideration of the Determination of Liability for Employment or Wages and the Determination of Unemployment Insurance Liability the Department issued on May 27, 2004 (Exhs. 7, 8). The Determinations were sent to the Employer by certified mail addressed to PO Box X, Phoenix, AZ 85080 (Exh. 9). The Employer did not receive the certified mail.

The Employer contends that the Department did not send the Determinations to the Employer's last known address, i.e., 1101-A, West X, Phoenix, Arizona 85027, which has been its address since it was incorporated in December 2002 (Tr. pp. 59-61). The Employer also asserts that the Arizona Corporation Commission document (Exh. 13), a copy of a Federal Deposit Coupon (Exh. 23), and its July 14, 2004 letter to the Department indicate that its last known address is 1101-A West X, not PO Box X.

Prior to mailing the Determinations to the Employer, the Department on April 21, 2004, sent a letter to the Employer indicating that it had scheduled on May 5, 2004, an audit of the Employer's financial records to determine if the Employer pays wages subject to unemployment insurance tax (Exh. 31). The letter was addressed to "PO Box X, Phoenix, AZ 85080." The Department obtained such address from a 1099 form that an unemployment insurance claimant, X, provided to the Department. The business that was using PO box X occupied the same building as the Employer, and the Employer received the Department's April 21, 2004 letter. The Employer called the Department to reschedule the audit to May 10, 2004, at 1101 West X, Suite A (Tr. p. 16). The audit was conducted on May 10, 2004. During the audit the Department auditor did not ask the Employer for its current mailing address. On May 27, 2004, the Department sent to the Employer a Determination of Liability for Employment or Wages and a Determination of Unemployment Insurance Liability (Exhs. 7, 8) by certified mail addressed to PO Box X.

At the time the Department sent the certified mail to the Employer, the forwarding order for PO Box X had expired (Exh. 9), and the certified mail was returned to the Department on June 6, 2004 (Exh. 11, p. 2). PO Box X was the post office box of Franchise Signs, Inc., a business entity separate from the Employer, but both the Employer and Franchise occupied the same building (Tr. pp. 62, 63). CB, an office manager/bookkeeper, prepared 1099 forms for three companies, including the Employer. A receptionist prepared the 1099s for the companies, but they were not proofread for the correct address. CB indicated that PO Box X on the Employer's 1099 form for unemployment claimant, X, "was a major screw-up" (Tr. pp. 64, 72).

Although PO Box X was not the Employer's mailing address, the Employer received the Determinations by regular mail on June 11, 2004 (Tr. pp. 72, 73). The company that used PO Box X occupied the same building as the Employer. On June 24, 2004, the Employer, by counsel, mailed to the Department a request for reconsideration of the Determinations (Exh. 15), which was thirteen days from June 11, 2004, the date the Employer actually received the Determinations. The Department by letter dated June 14, 2005, virtually a year later, responded to the Employer's request (Exh. 11). In the letter, the Department stated, among other things, that the Employer did not file its request within the statutory time period of fifteen days from the date of the Determinations and that under Arizona Administrative Code, Section R6-3-1404(B) the Employer's request could not be considered timely.

The majority concluded that the Employer failed to timely request reconsideration of the Determinations that the Department issued on May 27, 2004. I disagree. I find that the Employer's request for reconsideration of the Determinations was timely because: (1) under A.R.S. §23-724(A), the Department failed to serve the Determinations by certified mail addressed to the Employer's last known address; and (2) under Arizona Administrative Code,

Section R6-3-1404(B), the Employer did not delay from May 27, 2004, in submitting its request for reconsideration of the Determinations because the Department erred by sending the certified mail to PO Box X, instead of the Employer's last known address, i.e., 1101-A West X.

Under A.R.S. § 23-724(A), the Department is required to serve the Determinations on the Employer by certified mail addressed to the Employer's last known address. A.R.S. § 23-724(A) provides as follows:

> A. When the department makes a determination, which determination shall be made either on the motion of the department or upon application of an employing unit, that an employing unit constitutes an employer as defined in § 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in § 23-615 which is not exempt under § 23-617 or that remuneration for services constitutes wages as defined in § 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration. (emphasis added).

In 1977 Mercury Coupe, I.D. #7A93S623012 License Number 300TMI (CA) State v. Gallarzo, 129 Ariz. 378, 631 P.2d 533 (1981), the Supreme Court of Arizona considered the Arizona Department of Public Safety's requirement to mail a copy of a forfeiture notice to the last known address of the defendant. The State argued that it complied with the statute requiring it to mail a copy of the notice of forfeiture by sending the notice to the address stated in the departmental report of the arresting officers. Gallarzo pointed out that the Tijuana, Mexico address was not his last known address. That his last known address was the address stated in his bail release form. After considering other case law regarding an interpretation of last known address, the Court said:

> The interpretation we prefer requires the State to use reasonable diligence in ascertaining the last address of the claimant or owner. ***Requiring the State in a forfeiture proceeding to exercise due diligence to ascertain the last address of the owner is consistent with the requirements of due process. (citation omitted). In Mullane it was held that the due process clause of the United States Constitution demands that the notice given be that which is 'reasonably calculated under all the circumstances to apprise interested parties of the

> pendency of the action.' In forfeiture proceedings, this goal can be met by requiring the State to use reasonable diligence in ascertaining the last known address of the known claimants. Id, 129 Ariz. at 381, 631 P.2d at 536.

Here, the Department, as the State did in Gallarzo, failed to use reasonable diligence to ascertain the Employer's last known address. Contacting the Employer to ask for its current mailing address would have been the most commonsense direct way for the Department to have used reasonable diligence to ascertain the Employer's last known address. Contacting the Arizona Corporation Commission would have been the most commonsense indirect way to use reasonable diligence for the Department to ascertain the Employer's last known address. See, A.R.S. §§ 10-501 and 10-502. Moreover, when the Department conducted the audit at the Employer's place of business on May 10, 2004, the Department could have used reasonable diligence to ascertain the Employer's current address by asking the Employer for its current mailing address. Since the Department knew that it would be mailing the Determinations by certified mail, reasonable diligence should have compelled the Department to ascertain the Employer's current mailing address while conducting the audit on May 10, 2004.

The Department did not comply with A.R.S. §23-724(A) because it did not serve the Employer by certified mail addressed to the Employer's last known address. As the Court said in Gallarzo,supra, "It was the duty of the State to comply with the applicable statutory provision and provide [defendant] with the notice the law requires." Id, 129 Ariz. at 382, 631 P.2d at 537. Here, as in Gallarzo, it was the duty of the Department to comply with the applicable statutory provision, i.e., A.R.S. §23-724(A), and provide the Employer with the notice the statute requires. Since the Department did not comply with the statute, the Determinations did not become final fifteen days from May 27, 2004, because the Determinations become final only after the Determinations are served by certified mail addressed to the last known address of the Employer. The fifteen-day period for the Determinations to become final had not begun to run because the Department had not sent the certified mail addressed to the last known address of the Employer, as required by A.R.S. §23-724(A). The Employer actually received the Determinations by regular mail on June 11, 2004, and the Employer responded to the Determinations within fifteen days from June 11, 2004. Accordingly, since the Determinations had not become final, the Employer's request for reconsideration of the Determinations was timely filed.

In addition to the foregoing, under Arizona Administrative Code, Section R6-3-1404(B), the Employer's request for reconsideration of the Determinations was timely because the Department erred by failing to mail the Determinations to the Employer's last known address. The Department's error was the result of its failure to use reasonable diligence to ascertain the Employer's current address. Arizona Administrative Code, Section R6-3-1404(B) provides as follows:

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.

3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

4. If submission is not considered timely, and the subject matter is one for which Chapter 4, Title 23, A.R.S., provides administrative appeal rights, the Department shall issue an appealable decision to the interested party. The decision shall contain the reasons therefor, a statement that the party has the right to appeal the decision, and the period and manner in which such appeal must be filed under the provisions of the Arizona Employment Security Law. (emphasis added).

The Department erred by sending the Determinations to PO Box X. The error occurred because of the Department's misinformation about the Employer's last known address. The Department obtained the PO Box X address from a 1099 form provided by an unemployment insurance claimant, X. The Department did

not attempt to verify whether PO Box X was the Employer's last known address. Even though the Employer is a corporation, the Department did not check with the Arizona Corporation Commission to obtain the Employer's last known address or the address of the Employer's statutory agent, despite the Employer's requirement to maintain its current address on file with the Commission.

The Department also relied on an Arizona Joint Tax Application (Exh. 39) that it received on May 26, 2004, which indicated that the Employer's mailing address was PO Box X, rather than its physical address, 1101 W. X #A, which was also indicated on the Application. The Department merely compounded its error about the Employer's last known address by relying on the mailing address information on the Application. The Department's reliance was misplaced. The Department's witness conceded that the Application does not indicate that any officer of the Employer provided the information indicated on the Application or that any officer of the Employer signed the Application. The Department's witness did not know who provided the information on the Application (Tr. pp. 43-45).

Before May 27, 2004, the Department did not receive any correspondence or any document directly from the Employer indicating that its address was PO Box X. Instead, the Department relied on other sources, except the Arizona Corporation Commission where the Employer is required to maintain its correct address on file with the Commission. Moreover, the Department never asked the Employer for its correct mailing address, even though it should have done so on May 10, 2004, when it conducted the audit of the Employer at the Employer's physical address at 1101-A West X.

In essence, the department contends that it has the right to rely on the mailing address indicated by third party sources rather than use reasonable diligence to ascertain the Employer's current mailing address by contacting the Employer directly and asking for the Employer's current address. The Department's contention is unreasonable and contrary to the reasonable diligence required by the Court in Gallarzo, supra. As a result, the Department erred in sending the Determinations by certified mail to PO Box X, instead of the Employer's last known address, 1101-A West X.

For the foregoing reasons, I respectfully dissent. I find that the Appeals Board should reverse the Appeals Board decision dated December 1, 2006, because: (1) the Department did not use reasonable diligence to ascertain the Employer's current address and as a result, the Department failed to serve the Employer by certified mail addressed to the Employer's last known address, as required by A.R.S. §23-724(A); and (2) under Arizona Administrative Code, Section 1404(B), the Department erred by sending the Determinations by certified mail to PO Box X, instead of the Employer's last known address, 1101-

A West X. Accordingly, I find that the Employer timely filed its request for reconsideration of the Determinations.

WILLIAM G. DADE, Member

Dissenting

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT

This decision on review by the Appeals Board, is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. If you have questions about the procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

> C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.

D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:

1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.

2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.

3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.

4. The action cannot be initiated or maintained unless the appellant has previously filed a timely request for review under section 23-672 or 41-1992 and a decision on review has been issued.

A copy of the foregoing was mailed by certified mail on to:

(x) Er: X. Acct. No:

(x) ROBERT DUNN
ASSISTANT ATTORNEY GENERAL
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(x) JOHN B. NORRIS, CHIEF OF TAX
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PHOENIX, AZ 85005

By: _____
For The Appeals Board